

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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JUL 7 - 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re: Implementation of)
Section 309(j) of the Communications)
Act - Competitive Bidding)
Amendment of the Commission's)
Cellular PCS Cross-Ownership Rule)
Implementation of Sections 3(n) and 332)
of the Communications Act)
Regulatory Treatment of Mobile Services)

PP Docket No. 93-253

GN Docket No. 90-314

GN Docket No. 93-252

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COMMENTS IN RESPONSE TO

FURTHER NOTICE OF PROPOSED RULE MAKING

The law firm of John D. Pellegrin, Chartered, on behalf of various PCS auction applicants/clients, herewith files Comments in response to the Commission's request for such in its July 23, 1995 "Further Notice of Proposed Rule Making" (FCC 95-263). The July 23rd FNPRM primarily addresses the "legal uncertainties raised by the Supreme Court's recent decision in Adarand Constructors, Inc. v. Pena," (issued June 12, 1995) and the upcoming PCS auction of Broadband Block C.

I. The Proposed Equalization of Bidding Credits/Installment Payment Plans Should Be Applied to All Auctions Now.

The Commission states it will defer dealing with the Adarand issue as to minority/female preferences -- with an eye to trying to preserve such -- as to auctions other than the next one (i.e., the C block). (FNPRM at para. 1) While the Commission promises that interested parties will have another opportunity to address

Adarand's application with respect to such later auctions (FNPRM at para. 2 and fn. 6), the Commission must realize that its original conclusions in this FNPRM are correct and should be applied across the board. Thus, the Commission can still preserve the original sense of Congress expressed in its 1993 legislative directive (auction enabling legislation contained in the Omnibus Budget Reconciliation Act), while recognizing and implementing the current Congressional and federal court mandates and holdings eliminating tax credits and racial/gender preferences (TEC v. FCC staying of auction containing such preferences), as well as the now definitive Adarand +decision. This can be done by promoting the interests of **small businesses** as Designated Entities for the Entrepreneurial block auctions. This concept is already a part of this next, and should be with respect to all future DE auctions.

Such goal/mandate can and should be accomplished by treating **every entity** the same for all upcoming auctions. All future auctions should have available to all applicants similar credits and installment payment plans for smaller business entities -- the sole criterion. To do otherwise with respect to future auctions might otherwise delay such and exacerbate the very concern expressed by the Commission in its FNPRM, at para. 8 -- further head start for earlier auction winners (such as the Nationwide and Regional Narrowband auctions' license holders).

II. Desirable Specific Rule Changes -- Bidding Credits/Favorable Installment Payments and Terms

There are two specific issues we wish to address as set out in

the FNPRM, and with which we **fully** concur in the Commission's "tentative conclusions", so long as these criteria are observed for all auctions:

1. Amend Section 24.711 of the Rules "to provide for three installment payment plans for entrepreneurs' block applicants that are based solely on financial size. In particular, the small business installment payment plan would reflect the terms previously available to minority- or women-owned businesses"; and

2. Amend Section 24.712 of the Commission's Rules "to provide for a 25 percent bidding credit for small businesses only." (FNPRM at p. 3, para. 3)

The Commission has adequately stated the reasons why it is not confident its current criteria can withstand the Adarand test, particularly since the Supreme Court overruled Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (Adarand, slip opin. at 26). This was duly noted by the Commission in its FNPRM, at para. 5. For what is true today will still be so with respect to any other subsequent auctions, now that Adarand has been decided. Thus, the Commission should move forward to confirm equally favorable and more liberal installment payment terms, as well as making the bidding credit the same for all small businesses as it proposes with respect to the C Block auction. Thus, the Commission should further amend **all** Rules dealing with the current disparity in bidding credits and installment payment terms (e.g., Section 24.717 -- frequency Block F).

As the Commission points out in its FNPRM, maintaining and enhancing the **small business** element for Designated

Entity/Entrepreneur's Block treatment really embraces both minority and gender within such designation and thus is not a radical departure from its original intent in carrying out Congress's and Court's mandates/goals. (FNPRM at para. 12) It refocuses the Commission's attention and criteria where the Commission has all along wished to go -- viz, the smaller entrepreneurial entity which needs some federal assistance to have a more realistic chance to compete with larger, established telecommunications entities.

Such proposed changes and elimination of the distinction between minority- or female-controlled applicant business entities will also assist different small business entities/entrepreneurs (including general partnerships), in qualifying for the same treatment and benefits which the Commission and Congress originally established.

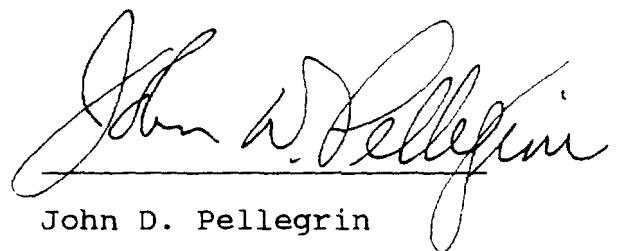
III. Benefits To Be Realized With All - Inclusive FCC Application Of Equal Bidding Credits/Installment Payment Terms For All Auctions

Such general partnerships may well be established with the goal in mind of focusing on one or two specific markets (MTAs and BTAs), particularly in the upcoming auctions for Broadband BTAs of 10 MHz, and then Narrowband licenses. These newly formed entrepreneurial entities' resources are not virtually limitless, as the Commission acknowledges in attempting to level the playing field and establish realistic incentives based on economic size. (FNPRM at paras. 24 and 27) It is for this reason that qualifying for bidding credits and related benefits becomes that much more important to the small to mid-size start-up entrepreneurial company. Hence, the Commission should recognize this fact and

allow all legitimately structured applicants to compete with any other similarly situated (here, small- to medium-size) PCS applicants. What is **not** sought here is an advantage -- rather, only **equality**.

WHEREFORE, it is respectfully submitted that the Commission modify **all** its auction Rules as proposed in its July 23, 1995 FNPRM, together with expanded coverage for **all** auctions, to provide for various installment payment plans based on the relative size of the applicant/entity, as well as establish a universal bidding credit for small business entities at 25 percent.

Respectfully submitted,



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Dated: July 7, 1995